Supreme Court, U. S.
FILED
FEB 17 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1160

SALVATORE D'ANGELO, PRESIDENT OF THE LOUISIANA BOARD OF PHARMACY, ET AL,
Petitioner,

versus

THE REVEREND JOHN WEBB, ET AL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

John R. Martzell
MARTZELL AND MONTERO
1010 Richards Building
New Orleans, Louisiana 70112
ATTORNEYS FOR PETITIONER

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096 N. O. LA. 70153 504 822 1611

BLEED THROUGH

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statutory and Constitutional Authority	3
Statement of the Facts	8
Reason for Granting Writ	10
Conclusion	15
Certificate of Service	16
APPENDIX	
Opinion of Court of Appeals	1a
Judgment of Court of Appeals	3a
Order of the District Court	5a
Significant Judicial Correspondence	(See certified record)

TABLE OF AUTHORITIES

Cases:

Bailey v. Patterson, 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed.2d 519 (1962) 11

Ex Parte Poresky, 290 U.S. 30, 78 L.Ed. 152, 54 S.Ct. 3 (1933) 11

Gonzales v. Automatic Employees Credit, 419 U.S. 90, 95 S.Ct. 289, 42 L.Ed.2d 249 (1974) 11

Goosby v. Osser, 409 U.S. 512, 93 S.Ct. 854, 35 L.Ed.2d 36 (1973) 11,13

Gunn v. University Committee, 399 U.S. 383, 90 S.Ct. 2013, 26 L.Ed.2d 684 (1970) 14

TABLE OF AUTHORITIES (Continued)

Page

Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968) 13

Hawkins v. Lawson, 379 F.Supp. 382 (W.D. Okl. 1974) 12

Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 113, 82 S.Ct. 1294, 8 L.Ed.2d 794 (1962) 11

Kaufman v. O'Hagen, 401 F.Supp. 792, (S.D. N.Y. 1975) 11

Lewis v. Brown, 404 U.S. 819 (1971) 13

Merced Rosa v. Harrero, 423 F.2d 591 (1st Cir. 1970) 12

Mengelkoch v. Industrial Welfare Commission, 393 U.S. 83, 89 S.Ct. 60, 21 L.Ed.2d 215 (1968) 14

Miller v. Biggs, 382 U.S. 805 (1965) 13

Miller v. Smith, 236 F.Supp. 927 (1st Cir. 1970) 12

MTM, Inc. v. Barley, 420 U.S. 799, 95 S.Ct. 1278, 43 L.Ed.2d 636 (1975) 11

Muskrat v. United States, 219 U.S. 346 (1911) 13

Pena v. Nelson, 400 F.2d 493 (D. Arizona 1975) 11

Pennsylvania Public Utility Com. v. Pennsylvania Ry. Co., 382 U.S. 281, 282, 86 S.Ct. 423, 15 L.Ed.2d 324 (1966) 14

Pennsylvania State Board of Pharmacy v. Pastor, 272 A. 2d 487 (1971) 10

BLEED THROUGH

TABLE OF AUTHORITIES (Continued)

Page

Shackman v. Arneburgh, 387 U.S. 427, 87 S.Ct. 1622, 18 L.Ed.2d 865 (1965) 14

Terry v. California State Board of Pharmacy, 395 F.Supp. 94 (N.D. Cal. 1975) 9

Virginia Citizens Consumer Council, Inc. v. Virginia State Board of Pharmacy, 373 F.Supp. 683 (E.D. Va. 1974), cert. granted ___ U.S. ___, ___ S.Ct. ___, Docket No. 74-895 (Oral Arguments, November 1975) 14

Wiley v. Brown, 400 U.S. 915 (1970) 13

Wilson v. City of Port Lavaca, 391 U.S. 35, 88 S.Ct. 1502, 20 L.Ed.2d 636 (1968) 14

OTHER AUTHORITIES

United States Constitution, Article III, Section 1 3

United States Constitution, Article III, Section 2 3

28 U.S.C. § 2281 (1948) 4,8,9

28 U.S.C. § 2284 (1960) 4,9

28 U.S.C. § 1651 (1949) 7,13

28 U.S.C. § 1292 ( ) 7

C. Wright, Federal Courts 34 (1963) 13

BLEED THROUGH

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No.

SALVATORE D'ANGELO, PRESIDENT OF THE LOUISIANA BOARD OF PHARMACY, ET AL,
Petitioner,

versus

THE REVEREND JOHN WEBB, ET AL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioner, Salvatore D'Angelo, President of the Louisiana Board of Pharmacy, et al, prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on November 12, 1975. That decision reversed and remanded the decision of the United States District Court for the Eastern District of Louisiana.

OPINIONS BELOW

The Opinion of the Court of Appeals (Appendix 1a) is without published opinion, 524 F.2d 238, 239. The decision of the District Court was unreported (certified copy Appendix 5a).

JURISDICTION

The decision of the Court of Appeals was entered on November 12, 1975. Appendix 3a. No petitions for rehearing or rehearing en banc were filed, and this petition for certiorari was filed within ninety (90) days of that date. A thirty (30) day stay of the Court of Appeals' Judgment has been granted to permit the filing of this petition. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1.

Does the United States Court of Appeals have jurisdiction to review the dismissal by a United States District Court of a petition for a three-judge court when the dismissal is predicated on a refusal by the Chief Judge of the Court of Appeals to convene a three-judge court because of a constitutionally insubstantial issue?

2.

Is an opinion by a United States Court of Appeals finding a constitutionally substantial issue contrary

BLEED THROUGH

to a finding of a constitutionally insubstantial issue in a petition for a three-judge court by the Chief Judge of the Circuit an impermissible "advisory opinion"?

STATUTORY AND CONSTITUTIONAL AUTHORITY

The Third Article of the United States Constitution provides:

> "SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different

States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

Section 2281 of the Judiciary Act, June 25, 1948, C. 646, 62 Stat. 968, Injunction against enforcement of State statute, three judge court required. Title 28 U.S.C. § 2281, official text, p. 2.

Section 2284 of the Judiciary Act, June 25, 1948, C. 646, 62 Stat. 968, June 11, 1960, Pub. L. 86-507, § 1 (19), 74 Stat. 201. Three-judge district court; composition; procedure, is set forth herein for the convenience of the Court:

BLEED THROUGH

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall ge given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same,or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement

BLEED THROUGH

> or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State. June 25, 1948, c. 646, 62 Stat. 968; June 11, 1960, Pub.L. 86-507, § 1(19), 74 Stat. 201.

For the convenience of the Court, Title 28, Section 1651, Writs of the same Act, June 25, 1948, c. 646, 62 Stat. 944, May 24, 1949, c. 139 § 90, 63 Stat. 102 is also set forth here:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. June 25, 1948 c. 646, 62 Stat. 944, May 24, 1949, c. 139 § 90, 63 Stat. 102.

Section 1292 of the Judiciary Act, Title 28 U.S.C. Interlocutory decisions may be found in the official text at pages 1, 2.

STATEMENT OF THE FACTS

The facts before this Court are not substantive but rather procedural and will be viewed in that light. The plaintiffs, as a class, respondents herein, brought suit against Salvatore D'Angelo as President of the Louisiana Board of Pharmacy, et al, seeking a declaration of unconstitutionality of LSA-R.S. 37:1225(11) briefly referred to as the Professional Code Prohibiting Advertising of Prescription Prices and for an injunction under 42 U.S.C. § 1343 (3); 42 U.S.C. § 1983. More particularly, the plaintiffs requested a three-judge Court under 28 U.S.C. § 2281. It is that request and denial of a three-judge Court which brought the case to appeal to the Fifth Circuit.

The District Judge to whom the complaint was allotted followed the custom of the United States District Court for the Eastern District of Louisiana by forwarding the complaint with its request to the Chief Judge without independent determination of facial constitutional substantiality for convening a three-judge Court.

Chief Judge Brown responded by means of a letter to the District Judge (Appendix omitted) stating that he would not convene a three-judge court since the complaint lacked constitutional substantiality. Based on the adverse determination of constitutional insubstantiality by the Chief Judge, the District Court dismissed the complaint.

The respondents appealed to the Court of Appeals for the Fifth Circuit, both on the procedural issue and

BLEED THROUGH

the substantive issue of whether in fact a constitutionally substantial issue had been presented.

Petitioners took the position that the Fifth Circuit did not have the jurisdiction to review a decision by the Chief Judge of the Circuit deciding constitutional insubstantiality under 28 U.S.C. § 2281 and 2284. In effect, the Fifth Circuit's review could and did result in an order to its own Chief Judge to find the issue constitutionally substantial. Secondly, the Appellees below argued that if the function of a Chief Judge under 28 U.S.C. § 2281 and 2284 was purely ministerial, then the remedy is not appeal of his decision to the Fifth Circuit but mandamus to the United States Supreme Court.

The Fifth Circuit, in hearing oral argument, requested that the respondents waive argument until petitioner addressed the jurisdictional problems. The Fifth Circuit panel listened carefully to appellant's explanation of the problem before it and nevertheless based its Judgment on the merits of the case as it held:

> We disagree with the ruling of the District Judge and are of the belief that plaintiffs have presented a substantial constitutional question by their suit — substantial within the meaning of such decisions of the United States Supreme Court as *Bailey* v. *Patterson*, 369 U.S. 31, 82 S.Ct. 549 (1962); *Ex parte Poresky*, 290 U.S. 30, 54 S.Ct. 3 (1933); *Goosby* v. *Osser*, 409 U.S. 512, 93 S.Ct. 854 (1973). *See, e.g., Terry* v. *California State Board of Pharmacy*, N.D. Cal., 1975, 395 F.Supp. 94, in which the California

statute similar to that involved here was declared unconstitutional by a three-judge court; *Virginia Citizens Consum. Coun., Inc.* v. *State Bd. of Pharm.*, E.D. Va. 1974, 373 F.Supp. 683, in which the Virginia statute to the same effect was declared unconstitutional by a three-judge court; and *Pennsylvania State Board of Pharmacy* v. *Pastor*, 272 A. 2d 487 (1971), in which the Supreme Court of Pennsylvania invalidated a state statute prohibiting the advertising of prescription drug prices.

Under the circumstances, the case is remanded to the District Judge with direction that he resubmit the plaintiffs' request for a three-judge court in this matter to the Chief Judge of this Circuit.

REVERSED AND REMANDED

REASON FOR GRANTING WRIT

The decision of the Fifth Circuit Court of Appeals raises serious questions in the administration of the three-judge court act. The decision of the District Court makes clear that dismissal was predicated on lack of jurisdiction.[1] The jurisprudence makes clear

---

1 Trial Record p. 4, lines 4-8 ". . . the reason that I dismissed the case was just because Judge Brown told me to dismiss the case; that's the sole and only reason I dismissed the case. If it can be clearer than that, I don't know how."

See also, Trial Record p. 18, lines 7-17 ". . . we used to make those decisions; that it's constitutionally insubstantial and we would get kicked in the teeth . . . we just bundled them up . . . and let Chief Brown make the decision."

BLEED THROUGH

that a District Judge may not proceed with a case seeking both declarative and injunctive relief involving the unconstitutionality of a state statute if the constitutional issue is insubstantial.[2] In the usual case, that initial determination is made by the District Judge.[3] In the instant case, the Chief Judge made the determination of constitutional insubstantiality, refused to convene the three-judge court and directed the District Court to enter an appropriate order. In the premises, the District Court had no jurisdiction to proceed and properly dismissed the complaint. In this context the statement of the Court of Appeals that they "disagree with the District Judge and are of the belief that plaintiffs have presented a substantial constitutional issue by their suit . . ." is factually incorrect. The District Court made no determination of constitutional insubstantiality. Chief Judge Brown made that determination and refused to convene the three-judge court.

The difficulty is illuminated when the order of the Court of Appeals on remand is considered. The District Judge is simply directed to resubmit the complaint to the Chief Judge, buttressed now with the contrary opinion of three of his brothers on the Court of Appeals. During oral argument, the Court of Appeal panel disavowed either the power or desire to man-

---

2 *Goosby* v. *Osser*, 409 U.S. 512, 93 S.Ct. 834, 34 L.Ed.2d 36 (1973); *Bailey* v. *Patterson*, 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed.2d 519 (1962); *Ex Parte Poresky*, 290 U.S. 30, 73 L.Ed. 152, 54 S.Ct. 3 (1933); *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 113, 82 S.Ct. 1294, 8 L.Ed. 794 (1962).

3 *Gonzales* v. *Automatic Employees Credit*, 419 U.S. 90, 95 S.Ct. 289, 42 L.Ed.2d 249 (1974); *MTM, Inc.* v. *Barley*, 420 U.S. 799, 95 S.Ct. 1278, 43 L.Ed.2d 636 (1975); *Goosby* v. *Osser*, supra; *Kaufman* v. *O'Hagen*, 401 F.Supp. 792 (S.D. N.Y. 1975); *Pena* v. *Nelson*, 400 F.2d 493 (D. Arizona 1975).

damus Chief Judge Brown. At this juncture the difficulties in the administration of the three-judge court act which support "cert worthiness" become manifest.

The Court of Appeals did not determine that Chief Judge Brown was powerless to determine constitutional insubstantiality.[4] At best the Court of Appeals held that he decided it wrongly. Yet, the Court of Appeals did not direct the convening of a three-judge court since that power is vested in the Chief Judge of the Circuit. At most, the Court of Appeals directed the District Court to pass the issue by the Chief Judge again. What the result will be if Chief Judge Brown is unpersuaded by the views of the panel in this case is unknown. Will the District Judge be compelled to dismiss the case again? Will the Court of Appeals again review that determination? What remedy is open to the Court of Appeals if it persists in its opinion of constitutional substantiality? The circular result posited by these questions and their possible answers leaves the litigants in confusion and the administration of the Act in disarray.

The problem of course is caused by the fact that the Court of Appeals arguably had no jurisdiction and that mandamus to the Supreme Court of the United States was the proper remedy. Respondents here maintained in the Court of Appeals that the duty of the Chief Judge to convene the three-judge court under 28 U.S.C. § 2281 and § 2284 is purely ministerial. If that be so, then the remedy to compel a ministerial duty is not

4 *Miller* v. *Smith*, 236 F.Supp. 927 (1st Cir. 1970); *Merced Rosa* v. *Harrero*, 423 F.2d 591 (1st Cir. 1970); *Hawkins* v. *Lawson*, 379 F.Supp. 382 (W.D. Okl. 1974).

BLEED THROUGH

appeal to the same court of which the "minister" is a member, but rather to this Court.[5] This is the route taken in similar cases.[6] The logic of mandamus as a remedy is reinforced by the result here. The Court of Appeals was wrong in reversing the District Court since dismissal is the proper disposition of such a case when the issue is constitutionally insubstantial.[7] The order of the Court of Appeals to resubmit the petition to the Chief Judge is a bootless effort since the Court of Appeals is powerless to grant the relief requested. Absent the power to enforce its opinion, the decision of the Court of Appeals is an "advisory opinion."

"(T)he oldest and most consistent thread in the federal law of justiciality is that the federal courts will not give advisory opinions." C. Wright, Federal Courts 34 (1963) cited with approval *Flast* v. *Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 1947 (1968); *Muskrat* v. *United States*, 219 U.S. 346 (1911). There was no "case" or "controversy" before the Court of Appeals because the party who had made the operative deci-

---

5 § 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. June 25, 1948 c. 646, 62 Stat. 944, May 24, 1949, c. 139 § 90, 63 Stat. 102."

Ex Parte Bransford, 310 U.S. 354 (1940); *Well* v. *United States*, 389 U.S. 90 (1967); *Bankers and Life Casualty Co.* v. *Holland*, 346 U.S. 379 (1953); *U.S.* v. *Hankish*, 362 F.2d 316 (4 Cir. 1972); *Lyons* v. *Davoren*, 402 F.2d 890 (1 Cir. 1968); *Stratton* v. *St. Louis S.W. Ry. Co.*, 292 U.S. 10, 51 S.Ct. 8, 75 L.Ed. 135.

6 *Miller* v. *Biggs*, 382 U.S. 805 (1965); *Wiley* v. *Brown*, 400 U.S. 915 (1970); *Lewis* v. *Brown*, 404 U.S. 819 (1971).

7 *Goosby* v. *Osser*, supra.

sion on constitutional substantiality, Chief Judge Brown, was not before that Court and was not subject to its writ. Petitioner respectfully submits that the Court of Appeals misconceived the "case" before it. The only "case" before the Court of Appeals was whether a District Judge properly dismisses a petition for a three-judge court for lack of jurisdiction when the Chief Judge refuses to convene the court because of *his* determination that the issue was constitutionally insubstantial. That issue was properly before the Court of Appeals.[8] However, a review of Chief Judge Brown's decision was not, and it is submitted, could not be before the Court of Appeals. Hence, the opinion of the Court of Appeals panel, while interesting and weighty, is only "advisory" to Chief Judge Brown. If Chief Judge Brown chooses not to take the advice,[9] the litigants are back where they started when the suit was filed in July of 1974. Petitioners respectfully suggest that this is no way to administer a railroad much less a statute.

The administration of the three-judge court act has begotten frequent and complicated litigation. Congress may or may not resolve the matter or complicate it further. Petitioner earnestly requests that this Court

---

8 *Gunn* v. *University Committee*, 399 U.S. 383, 90 S.Ct. 2013, 26 L.Ed.2d 684 (1970); *Mengelkoch* v. *Industrial Welfare Commission*, 393 U.S. 83, 89 S.Ct. 60, 21 L.Ed.2d 215 (1968); *Wilson* v. *City of Port Lavaca*, 391 U.S. 35, 88 S.Ct. 1502, 20 L.Ed.2d 636 (1968); *Shackman* v. *Armeburgh*, 387 U.S. 427, 87 S.Ct. 1622, 18 L.Ed.2d 865 (1965); *Pennsylvania Public Utility Com.* v. *Pennsylvania Ry. Co.*, 382 U.S. 281, 282, 86 S.Ct. 423, 15 L.Ed.2d 324 (1966).

9 This Court has under submission the almost identical substantive issue in *Virginia Citizens Consumer Council, Inc.* v. *State Board of Pharmacy*, 373 F.Supp. 683 (E.D. La. 1974), *cert. granted*, ___ U.S. ___, ___ S.Ct. ___, Docket No. 74-895 (Oral Argument, November 1975).

BLEED THROUGH

accept certiorari in this matter and resolve the dilemma before the matter becomes further entangled. The latent hope that Chief Judge Brown will accede to his brothers' opinion and cut the Gordian knot does not resolve the real issue rasied herein. The doctrine of constitutional insubstantiality, once invoked, must give rise to regular routes of review. The route sought by respondents and embraced by the Court of Appeals does not resolve the problem and simply relegates the parties to a repeat performance. This Court should clear the air.

CONCLUSION

For the reasons set forth above, petition for writ of certiorari should be granted to review the judgment and directive of the Fifth Circuit Court of Appeals to the single district court judge of the Eastern District to send the case back to the Chief Judge for another determination of constitutional substantiality to convene a three judge court.

Respectfully submitted,

JOHN R. MARTZELL
Martzell and Montero
1010 Richards Building
New Orleans, Louisiana 70112
Telephone: 581-9065

Attorney for Petitioners

CERTIFICATE OF SERVICE

I, John R. Martzell, hereby certify that a copy of the foregoing Petition for a Writ of Certiorari to the United States Supreme Court has been served on:

Jack Mark Stolier, Esq.
New Orleans Legal Assistance Corporation
3200 St. Bernard Avenue
New Orleans, Louisiana 70119

David A. Marcello, Esq.
Louisiana Center for the Public Interest
1222 Maison Blanche Building
New Orleans, Louisiana 70112

by placing same properly addressed in the United States Mail with adequate postage affixed thereto on this the ____ day of February, 1976.

JOHN R. MARTZELL

BLEED THROUGH

APPENDIX I

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-3431

THE REVEREND JOHN WEBB, ET AL.,
Plaintiffs-Appellants,

versus

SALVATORE D'ANGELO, President of the Louisiana Board of Pharmacy, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

---

(November 12, 1975)

Before GOLDBERG and AINSWORTH, Circuit Judges, and NICHOLS,* Associate Judge.

PER CURIAM:

In this class action plaintiffs sought declaratory and injunctive relief against defendants on allegations of the unconstitutionality of La. R.S. 37:1225(11), a Louisiana statutory provision which prohibits the

---

* Of the U. S. Court of Claims, sitting by designation.

publication, advertisement or promotion of the prices of prescription drugs. Additionally, plaintiffs sought the convening of a three-judge statutory court for the hearing and determination of the case. The District Judge submitted the request for the convening of the three-judge court to the Chief Judge of this Circuit and the request was denied. On that basis the District Judge dismissed plaintiffs' suit holding that the court was without jurisdiction in the matter.

We disagree with the ruling of the District Judge and are of the belief that plaintiffs have presented a substantial constitutional question by their suit — substantial within the meaning of such decisions of the United States Supreme Court as Bailey v. Patterson, 369 U.S. 31, 82 S. Ct. 549 (1962); Ex parte Poresky, 290 U.S. 30, 54 S. Ct. 3 (1933); Goosby v. Osser, 409 U.S. 512, 93 S. Ct. 854 (1973). *See e.g.*, Terry v. California State Board of Pharmacy, N. D. Cal., 1975, 395 F. Supp. 94, in which the California statute similar to that involved here was declared unconstitutional by a three-judge court; Virginia Citizens Consum. Coun., Inc. v. State Bd. of Pharm., E. D. Va., 1974, 373 F. Supp. 683, in which the Virginia statute to the same effect was declared unconstitutional by a three-judge court; and Pennsylvania State Board of Pharmacy v. Pastor, 272 A. 2d 487 (1971), in which the Supreme Court of Pennsylvania invalidated a state statute prohibiting the advertising of prescription drug prices.

Under the circumstances, the case is remanded to the District Judge with direction that he resubmit the plaintiffs' request for a three-judge court in this matter to the Chief Judge of this Circuit.

REVERSED AND REMANDED.

BLEED THROUGH

APPENDIX II

United States Court of Appeals
For the Fifth Circuit

October Term, 1975

No. 74-3431

D. C. Docket No. CA-74-2055 "F"

THE REVEREND JOHN WEBB, ET AL.,
Plaintiffs-Appellants,

versus

SALVATORE D'ANGELO, President of the Louisiana Board of Pharmacy, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

Before GOLDBERG and AINSWORTH, Circuit Judges, and NICHOLS,* Associate Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

---

* Of the U. S. Court of Claims, sitting by designation.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

November 12, 1975

Issued as Mandate:

BLEED THROUGH

APPENDIX III

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THE REVEREND JOHN WEBB, et al

VERSUS

Civil Action
No. 74-2055
SECTION "F"

SALVATORE D'ANGELO, et al

This matter, having come before the Court on this date:

It is Ordered that plaintiffs' motion to vacate is granted, and the Court's Order of August 13, 1974, is vacated.

The issue of constitutional insubstantiality, having been determined adversely to plaintiffs by John R. Brown, Chief Judge, United States Court of Appeals for the Fifth Circuit:

It is Ordered that the convening of a three-judge court is Denied. Since this Court is therefore without jurisdiction, this action is dismissed without prejudice.

Dated this 4th day of September, 1974, New Orleans, Louisiana.

/s/ LANSING L. MITCHELL
United States District Judge

[Filed: Sept. 4, 1974]